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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 626

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, NEW YORK COUNTY, AND BRIEF IN SUPPORT THEREOF.

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

JOHN F. X. FINN,
VERNON C. RYDER,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended (28 U. S. C. A., Section 344 (b)), and Supreme Court Rule 38, par. 5 (a).

STATUTE INVOLVED.

Section 3477 of the United States Revised Statutes (31 U. S. C. A., Sec. 203). The specific portion of the Statute more particularly involved reads as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration

therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

Summary Statement.

Petitioner S. A. Scotti & C. of Monza, Italy (hereinafter called Scotti of Monza), is an Italian Corporation, located in Monza, near Milan, Italy. It is engaged in the manufacture of wool felt hat bodies, referred to in the trade as "wool felts". American Scotti Corporation (hereinafter called American Scotti) is Scotti of Monza's wholly owned American subsidiary. It was organized in New York in 1929, and from that time until November, 1932, was actively engaged in the importation of wool felts into the United States (Min., pp. 5-6).

When American Scotti ceased actively to do business in 1932, Scotti of Monza entered into a contract with the respondent whereby respondent became the exclusive United States sales agent of Scotti of Monza and the liquidator, on a commission basis, of the unsold merchandise of American Scotti (Min., pp. 10, 455-456; Ex-

hibits A and B annexed to Defendant's Answer, Judgment Roll.

During American Scotti's active business existence, protests had been filed against the rate of duty being exacted on its importations of wool felts (Min., pp. 3, 92). A successful prosecution of those protests would result in refunds to the Company of about $100,000. After November, 1932, respondent, acting as the agent of Scotti of Monza, imported similar merchandise on consignment for the account of its said principal. Similar protests were filed with respect to those importations, and, if allowed, would entitle Scotti of Monza to about $50,000 of refunds (Min., pp. 3, 617, 646, 660-686).

Shortly prior to November 7, 1935, respondent and Scotti of Monza exchanged cables looking toward the purchase by respondent of plaintiffs' remaining stock of merchandise in the United States (Min., pp. 70, 124-133; Pltffs'. Exs. 3, 5, 6, Min., pp. 22, 23). A price of $10,000 was agreed upon. Before cabling his acceptance, one Maurice Pollak, the president of respondent company, called to his office one Scarpa, a former employee and the secretary of American Scotti (Min., pp. 454, 36). He requested Scarpa to cable Scotti of Monza for authorization to sign an agreement with respect to future liquidations of customs entries whereby respondent would assume liability for any additional duties and petitioners would renounce in respondent's favor any refunds resulting from such liquidations (Min., pp. 38, 498-500). The ensuing exchange of cables between Scarpa and Scotti of Monza, whereby such authorization was requested and given, was restricted to future liquidations of customs entries and made no mention of the reliquidation refunds which were the subject matter of the protests mentioned above (Pltffs'. Exs. 6, 7-A, 7-B, 8-A, 8-B, Min., pp. 23, 34, 35). At the trial proof was adduced of the distinction

between liquidation refunds in ordinary course and reliquidation refunds pursuant to court order (Min., pp. 203-208).

The sale of said merchandise was evidenced by a letter form of agreement, which was prepared in Pollak's office and signed by him on behalf of respondent and by Scarpa on behalf of the petitioner (Pltffs'. Ex. 9, Min., pp. 44-45). The letter, dated November 7, 1935, is printed in full in Appendix A to Petitioners' Brief hereto, pages 29-30, thereof. The third paragraph of said letter reads as follows:

> "Likewise, it is understood that, in reference to duties, any refunds accruing on all Felts imported by American Scotti Corporation, or ourselves for account of American Scotti Corporation or for account of S. A. Scotti & Company of Monza, are for account of Henry Pollak, Inc., and that, likewise, any additional duties that may be imposed are for account of Henry Pollak, Inc."

It is undisputed in this action that the execution of said letter form of agreement was attended by none of the formalities prescribed by Section 3477 of the United States Revised Statutes, and was not executed after the allowance of plaintiffs' said claims against the Government and the ascertainment of the amounts due; and that it does not recite the issuance of any warrant for payment thereof.

Subsequently in about July, 1940, the customs litigation with respect to protests on wool felts was determined in favor of the importers (Min., p. 312). By reason thereof and the consequent reclassification of petitioners' merchandise, the entries of wool felts by or for the account of each of these petitioners were reliquidated and the petitioners became entitled to various refunds of customs duties in the total amount of about $150,000 (Min., pp. 3-4,

699; Deft.'s Ex. A., Min., p. 2). Those refunds, which would otherwise have been the property of the petitioners, were claimed by the respondent on the strength of the third paragraph of said letter form of agreement set forth above (Defendant's Answer, Judgment Roll, pars. 4, 10).

Petitioners brought an action in the Supreme Court of the State of New York, County of New York, to be adjudged the owners of said reliquidation refunds claiming, among other things, that if said letter form of agreement was asserted to contain an assignment of said refunds, the same was void under said Section 3477. On motion of the respondent, a Receiver was appointed to collect and hold, subject to the further order of the Court, the refunds payable to American Scotti. The refunds payable to Scotti of Monza were not affected by said Receivership (Deft.'s Ex. B, Min., p. 2). The Receiver collected $104,473.12 of such refunds on importations made in its name for the account of petitioner Scotti of Monza (Min., pp. 3-4, 699; Deft.'s Ex. A, Min., p. 2).

Shortly after the commencement of this action, petitioners moved for judgment on the pleadings. The motion was denied, with an opinion which was not officially reported but which is printed as Appendix B to Petitioners' Brief hereto (pp. 31-34 thereof). Upon appeal to the Appellate Division of said Supreme Court, First Department, said order of denial was affirmed (259 App. Div. 878).

Thereafter the case was tried by the Court without a jury and judgment was entered for the respondent with an opinion which was not officially reported but which is printed as Appendix C to Petitioners' Brief hereto (pp. 35-36, thereof).

On appeal to the Appellate Division, said judgment was unanimously affirmed, without opinion (257 App. Div. 890).

The Appellate Division denied leave to appellants to appeal to the Court of Appeals (267 App. Div. 954). Thereafter petitioners moved before the Court of Appeals for leave to appeal to said Court and to have such appeal heard on the original record, but by order entered in the office of the Clerk of said Court of Appeals on July 19, 1944, said motion was denied (295 New York Reports, no page number having yet been assigned; Weekly Advance Sheets, September 16, 1944).

As stated above, the Appellate Division in affirming the judgment below rendered no opinion. The opinion of the Trial Justice, however, makes it clear that in upholding the validity under R. S. Section 3477 of the alleged assignment herein, he was relying upon *Martin* v. *National Surety Company*, 300 U. S. 588, as having overruled this Court's previous decision in *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

Petitioners have maintained throughout this litigation that the *Martin* case was expressly limited to the special circumstances there involved and is not susceptible to the broad construction which the lower Court placed upon it. It is respondent's contention that this Court, by its decision in the *Martin* case, did not intend to overrule *National Bank of Commerce* v. *Downie*, which held that assignments like that at bar are "absolutely null and void".

Questions Presented.

(1) Whether the decision in the case of *Martin* v. *National Surety Company*, 300 U. S. 588, overrules the long line of decisions of this Court epitomized by *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

(2) Whether the assignment relied on by the respondent in this case is void under said Section 3477 of the United States Revised Statutes.

The Federal question here involved was first raised by Petitioners in their complaint in this action (Judgment Roll, Complaint, pars. XIV-XVI). It was the basis of Petitioners' motion for judgment on the pleadings herein and was considered at length in the Court's opinion in deciding said motion (Appendix B to Petitioners' Brief, p. 31-34, thereof). It was again raised at the trial of the action (Opinion of Trial Justice, Judgment Roll; Appendix C to Petitioners' Brief hereto, pp. 35-36 thereof). The question was also argued and fully briefed before the Appellate Division and was again the basis for Petitioners' application for leave to appeal to the Court of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the lower Court is contradictory to the decisions of this Court holding invalid assignments of the nature involved in the instant case.

(2) The decision of the lower Court is contradictory to the previous decisions of the Courts of New York State which, since *National Bank of Commerce* v. *Downie*, 218 U. S. 345, have consistently applied the rule enunciated by this Court in that case.

(3) The lower Court has misinterpreted and misapplied the decision of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588.

(4) A determination of the questions here presented will remove the uncertainty and confusion which exists

among the decisions of the State and Federal Courts with respect to the interpretation of the *Martin* case.

(5) The legislative history of the Assignment of Claims Act of 1940, amending Section 3477, indicates Congressional understanding that *National Bank of Commerce* v. *Downie* correctly represents the present state of the law under said section.

(6) The public interest and the interest of the United States Government will be promoted by prompt settlement by this Court of the questions here involved.

Wherefore, your petitioners pray that a writ of certiorari be issued by this Court directed to the Supreme Court of the State of New York, County of New York, to the end that the said judgment of the Appellate Division of said Supreme Court, First Department, in said cause entitled *American Scotti Corporation and S. A. Scotti & C. of Monza, Italy*, plaintiffs, against *Henry Pollak, Inc.*, defendant, Docket No. 28551—1938, be reviewed by this Court as provided by law, and that, upon such review, said judgment be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

Dated: New York, October 17, 1944.

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

John F. X. Finn,
Vernon C. Ryder,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

Motion for Leave to Proceed on the Original Record.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, American Scotti Corporation and S. A. Scotti & C., of Monza, Italy, respectfully move this Court for an order granting them leave to proceed herein on the original record, consisting of the original typewritten Judgment Roll, the original Stenographer's Minutes of the trial and the Exhibits received in evidence. The reasons for such requests are as follows:

The principal Petitioner herein is S. A. Scotti & C., an Italian Corporation, located in Monza, near Milan, Italy. The other Petitioner, American Scotti Corporation, is its wholly owned and inactive American subsidiary.

During the course of this litigation, and after the outbreak of war in Europe, the Appellate Division of the Supreme Court of the State of New York, First Depart-

ment, directed a stay of proceedings until the President of the Italian Company could come to this country for an examination before trial. After the declaration of war between this country and Italy, however, the case was, on Respondent's motion, restored to the Ready Calendar for trial. This was done over Petitioners' objection that under the Trading with the Enemy Act the trial should be suspended for the duration of the war. The order of restoration was affirmed by the Appellate Division, two Justices dissenting, and Petitioners' motion for leave to appeal to the Court of Appeals was denied.

The case then proceeded to trial in the absence of and without means of communication with Petitioners' principal in Italy. After entry of the judgment below, the Appellate Division, when apprised of Petitioners' plight and of the impossibility of transferring funds to this country for the further prosecution of this litigation, accorded Petitioners permission to appeal from the judgment below upon the original record. Application must now be made to this Court for the same relief.

The cost of printing the record on appeal herein would be prohibitive to Petitioners' counsel. The minutes of the trial would comprise about 600 pages of a printed record. Approximately 120 exhibits were received in evidence. The pleadings, findings and other papers in the Judgment Roll cover more than 100 typewritten pages. It is estimated that the printed record would comprise about 1,000 pages and that the printing thereof would cost not less than $1500.

The funds which have been heretofore provided by Petitioners for the conduct of this litigation have been exhausted. Since the declaration of war between this country and Italy, it has, of course, been impossible to transfer additional funds to this country for this purpose. As a result the funds are not now available to

meet the heavy expense of preparing the full printed record which the proceeding before this Court would entail.

It is therefore respectfully requested that the Court grant leave to Petitioners to proceed herein on the original record, consisting of the Judgment Roll, the Stenographer's Minutes of the trial and the Exhibits received in evidence. The originals of said papers will be lodged with the Clerk of this Court but, for the convenience of the Court, Petitioners have prepared nine typewritten copies of the papers comprising such Judgment Roll and leave to submit such copies is also requested.

Dated: New York, October 17, 1944.

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

JOHN F. X. FINN,
VERNON C. RYDER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Court at Special Term in denying petitioners' motion for judgment on the pleadings was not reported but is printed as Appendix B hereto (pp. 31-34).

The opinion of the Court at Special Term in granting judgment for the respondent herein was not reported but is printed as Appendix C hereto (pp. 35-36); Opinion of Mr. Justice Levy, Judgment Roll.

The Appellate Division in affirming said judgment delivered no opinion, and no opinion was delivered by either the Appellate Division or by the Court of Appeals in denying petitioners' motion before each of said Courts, respectively, for leave to appeal to the Court of Appeals.

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth on page 1 of the foregoing petition and is, by reference, adopted as part of this brief.

Statement.

The material facts have been set forth in the Summary Statement at pages 2 to 6 of the preceding petition and such statement is, by reference, adopted as part of this brief.

Argument.

POINT I.

The decision of the State Court is at variance with the decisions of this Court holding invalid assignments of the nature involved in the instant case.

(a)

This Court has repeatedly held that any purely voluntary transfer or assignment of an unliquidated claim against the Government, such as that relied on herein, is absolutely null and void.

United States v. *Gillis*, 95 U. S. 407;
Spofford v. *Kirk*, 97 U. S. 484;
Hager v. *Swayne*, 149 U. S. 242;
Nutt v. *Knut*, 200 U. S. 12;
National Bank of Commerce v. *Downie*, 218 U. S. 345.

In *Spofford* v. *Kirk*, 97 U. S. 484 and *Hager* v. *Swayne*, 149 U. S. 242, the Court pointed out the mischiefs which the statute was designed to prevent.

The case most frequently cited under the statute is that of *National Bank of Commerce* v. *Downie*, *supra*. In concluding that the assignments then before the Court were in direct opposition to the Statute, Mr. Justice Harlan referred with approval to the language of the Court in *Spofford* v. *Kirk*, 97 U. S. 484 and added at pages 356-357:

> "If any regard whatever is to be had to the intention of Congress, as manifested by its words,—too clear, we think, to need construction,—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. * * * Any other holding will effect a repeal of the statute by mere judicial construction in disregard of the plain, unequivocal intent of Congress, as indicated by the Statute".

(b)

Respondent has apparently urged with success in the Court below that, the refunds having already been paid by the Government, the assignment in suit was valid as between the parties.

If this was the ground upon which the lower Court based its holding, then the same is at variance with prior decisions of this Court where such an assignment was held ineffectual even though the Government had already paid the claims.

Spofford v. *Kirk*, 97 U. S. 484;

National Bank of Commerce v. *Downie*, 218 U. S. 345.

In *Spofford* v. *Kirk*, *supra*, the assignee made the contention that, once the fund was paid over, the assignee acquired an equitable lien on the proceeds. This contention was noted by the Court and expressly rejected.

POINT II.

The decision of the lower Court is at variance with the previous decisions of the highest Court of New York State.

Prior to this Court's decision in *National Bank of Commerce* v. *Downie*, the New York Court of Appeals had held in the case of *York* v. *Conde*, 147 N. Y. 486, that an informal assignment, though unenforceable as against the Government, was nevertheless effectual as between the parties. Following the *National Bank of Commerce* v. *Downie* case, however, the Court of Appeals unconditionally adopted this Court's construction of the statute to the effect that, even as between the parties, informal assignments of Government claims were null and void.

Manhattan Commercial Co. v. *Paul*, 216 N. Y. 481; *Levinson* v. *Illinois Surety Co.*, 222 N. Y. 280.

In the *Manhattan Commercial Co.* case the Court, referring to *National Bank of Commerce* v. *Downie*, said:

> "We accept said decision as an authority and, controlled by it, hold that the present assignment or transfer or authorization was likewise null and void" as between claimant and assignee and did not vest in the assignee "any right whatsoever, legal or equi-

table, to the moneys paid by the United States on the claims".

The Court of Appeals closed its decision with the statement:

> "* * * the language of the statute and of the opinion in the *National Bank of Commerce* case interdicts further discussion".

In *Levinson* v. *Illinois Surety Co.*, the Court, in likewise holding the assignment there involved to be void under the statute, referred to its previous decision in the *Manhattan Commercial Co.* case, and again cited *National Bank of Commerce* v. *Downie*, and at page 287 added:

> "All rights therefore, legal or equitable, arising from the assignment made by Vermilye & Power to the plaintiffs are as if such assignment had never been executed and delivered".

It is to be noted that when each of these controversies came before the Court the claims had been paid and the Government had been discharged from all liability.

The decision of the Court below is also contrary to the latest pronouncement by the Court of Appeals on Section 3477, contained in *McKenzie* v. *Irving Trust Co.*, decided on April 13, 1944 (292 N. Y. 348). That decision was handed down subsequent to the affirmance by the Appellate Division of the judgment in the instant case. The *McKenzie* case dealt with the 1940 amendment to R. S. 3477.

The point there involved was whether the Trust Company in taking an assignment of United States Government claims as security for advances of $150,000 had made timely compliance with certain conditions which the amendment had imposed on the validity of the assign-

ment. The Court of Appeals decided in favor of the Trust Company. The Court, however, expressed its adherence to prior precedents by stating that the assignment to the Irving Trust Company "would undoubtedly have been absolutely 'null and void' if the Statute had not been amended on November 7, 1940" (pp. 353-354).

The holding of the State Court, therefore, in giving effect to the assignment in suit, was inconsistent with the prior decisions of the highest Appellate Court of the State of New York, and with the very recent decision of that Court in the *McKenzie* case.

POINT III.

The Court below has misinterpreted and misapplied the decision of this Court in *Martin* v. *National Surety Company,* 300 U. S. 588.

The State Court, in giving effect to the assignment herein, contrary to the cited statutory provisions, has apparently adopted respondent's contention that the effect of the *Martin* case was to overrule *National Bank of Commerce* v. *Downie.* It is submitted that no such effect is attributable to the decision in *Martin* v. *National Surety Company.*

As a matter of fact this Court stated in so many words that its opinion in the *Martin* case was to be "kept within the strict necessities of the specific controversy" there involved (p. 593).

The specific controversy referred to arose out of a Government contract, where laborers and materialmen remained unpaid, and where the fund which should have been devoted to their payment had, through unconscionable conduct, been appropriated by Martin.

The Court was seeking to prevent a fraud, and it accordingly invoked every equitable principle for the benefit of unpaid laborers and materialmen and found an equitable lien to have been created in their favor by an assignment which the contractor had given to the surety company. That this is the basis of the Court's decision appears from the following (p. 595):

> "If the Government has any interest in the outcome of this controversy it is in sustaining the assignment to the surety rather than destroying it. The contractor undertook that materialmen would receive their money promptly while the work was going on. In failing to pay them, he violated a duty to them, but a duty also to the Government, for the default was a breach of the condition of the bond. If the assignment to the surety creates a lien upon the fund, the contractor will be compelled to fulfill the duty thus assumed."

Further to limit the extent of its holding, the Court then went on to say:

> "A different question would be present if the surety was seeking to keep the money for itself."

The Courts have frequently recognized the moral obligation of the United States in public contract cases to see that laborers and materialmen are paid for their services and materials.

Henningsen v. *U. S. F. & G. Co.*, 208 U. S. 404;
Belknap Hardware Mfg. Co. v. *Ohio River Contract Co.*, 271 Fed. 144 (C. C. A. 6th);
Prairie State Bank v. *U. S.*, 164 U. S. 227;
American Surety Co. v. *Westinghouse Elec. Mfg. Co.*, 296 U. S. 133;
Riverview State Bank v. *Wentz*, 34 Fed. (2d) 419.

It is clear that in the *Martin* case this Court was not dealing with an ordinary assignee, as in the instant case, but with an assignee whose rights, under the particular circumstances there involved, were coextensive with the moral obligation of the Government. As the Court said at page 597:

> "Far from defeating or prejudicing the interests of the Government, the recognition of the equities growing out of the relation between the contractor and the surety will tend, as already has been suggested, to make those interests prevail."

It is submitted, therefore, that the decision in the *Martin* case was intended to be confined within the narrow compass outlined above and that the lower Court erred in interpreting it as overruling *National Bank of Commerce* v. *Downie*.

POINT IV.

This Court should determine the question here presented in order to remove the existing uncertainty and confusion in the State and lower Federal Courts with respect to the interpretation of the *Martin* case.

In those cases where *Martin* v. *National Surety Company* has been applied to situations involving Government contracts, no uncertainty or confusion arises. To such cases the language of the decision therein has direct application and is uniformly cited in support of the principle holding the proceeds of a public contract to be impressed with the equities in favor of laborers and materialmen. Among such cases are:

> *California Bank* v. *U. S. F. & G. Co.*, 129 Fed. (2d) 751 (C. C. A. 9th, 1942);

Maryland Casualty Co. v. *Lincoln Bank and Trust Co.*, 40 Fed. Supp. 782, 786 (Dist. Ct. W. D., Ky., 1941);

Century Cement Manufacturing Co., Inc. v. *Fiore*, 264 App. Div. 475, 479 (3rd Dept. 1942);

Hedley v. *New Amsterdam Casualty Co.*, 267 App. Div. 800 (4th Dept., 1943);

National Surety Corporation v. *Mass. Bonding and Insurance Co.*, 280 Ky. 785, 792 (1939).

In *Maryland Casualty Company* v. *Lincoln Bank and Trust Company*, *supra*, the Court laid stress in its opinion on the strict application which this Court's decision in the *Martin* case was intended to have.

The moment, however, that the *Martin* case is put to use in cases not involving Government contracts and involving ordinary assignments, such as the one at bar, a broadening field of conflict is encountered.

In some cases the *Martin* case is cited in support of the proposition that after payment of a Government claim, an informal assignment, otherwise void under the statute, may nevertheless be valid as between the parties. It is apparent that no such result could have been reached except in consequence of the Court's conclusion that *National Bank of Commerce* v. *Downie* was overruled by the *Martin* case:

Bank of California v. *Comm. Internal Revenue*, 133 Fed. (2d) 428, 432-433 (C. C. A. 9th, 1943);

U. S. v. *Certain Lands in Town of Highlands*, 49 Fed. Supp. 962, 965 (Dist. Ct. S. D. N. Y., 1943);

Rosecrans v. *Wm. S. Lozier, Inc.*, 142 Fed. (2d) 118, 124 (C. C. A. 8th, 1944).

In one case where *Martin* v. *National Surety Company* was cited, the Court even went so far as to say that the

statute has no application to transactions between private individuals. *Rosecrans* v. *William S. Lozier, Inc., supra.*

In two cases, involving ordinary assignments, the Courts reached diametrically opposite conclusions regarding the scope of this Court's decision in the *Martin* case:

> *In re Meadow Sweet Farms*, 32 Fed. Supp. 119 (Dist. Ct. W. D. N. Y., 1940);
> *In re Webber Motor Co.*, 52 Fed. Supp. 742 (Dist. Ct. D. N. J., 1943).

Re Meadow Sweet Farms, supra, involved assignments by a bankrupt of accounts receivable from the Federal Goverment as collateral security for loans. After the bankruptcy of the assignor, the assignee bank brought on a proceeding, claiming to be entitled to about $640 collected from the Government by the trustee in bankruptcy.

The Court held, in denying the application, that the assignments were void, even though they had been made for a present consideration, since they did not comply with the statutory provisions of Section 3477 of the U. S. Revised Statutes. Counsel for the trustee had contended, as do the attorneys for the defendant in the instant case, that the *Martin* case overruled *National Bank of Commerce* v. *Downie, supra.* In flatly rejecting that contention, Burke, *J.*, said:

> "* * * The decision here turns on the interpretation of the statute regarding assignments (*supra*). The Supreme Court held in *National Bank of Commerce* v. *Downie*, 218 U. S. 345, where the controversy as to the right to the fund was, as here, between a trustee in bankruptcy and a prior assignee, that assignments not in accordance with the statute were null

and void. In *Martin* v. *National Surety Co.*, 300 U. S. 588, the court announced a more liberal view of the statute under other circumstances, but did not overrule the *Downie* case. I think the *Downie* case must control."

In sharp contrast, is the case of *In re Webber Motor Co., supra.* The facts there were similar to those in the *Meadow Sweet* case but in the contest between the trustee and assignee, the finding was in favor of the assignee. The Court, after referring to *National Bank of Commerce* v. *Downie*, said at page 744:

> "The case upon which the Trustee primarily relies, *National Bank of Commerce* v. *Downie*, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 116, would seem to support his contention, but it is our opinion that the broad construction therein adopted must yield to the limited construction adopted by the Supreme Court in the case of *Martin* v. *National Surety Company, supra.* The latter interpretation is clearly consistent with the language and purpose of the statute. Any distinction between the cases, which we should attempt to draw, would be tenuous".

To say that the distinction between the *Webber* case and *Martin* v. *National Surety Company* is tenuous, is equivalent to saying that the *Martin* case is to be given the broadest application as regards ordinary assignments, a construction which this Court's opinion in the *Martin* case expressly cautioned against.

On the other hand the Court of Claims has consistently followed *National Bank of Commerce* v. *Downie*:

> *Seaboard Air Line* v. *U. S.*, 53 Ct. Cls. 107, 113 (1918);

Packard Co. v. *U. S.*, 59 Ct. Cls. 354, 364 (1924);
Bolivar Cotton Oil Co. v. *U. S.*, 95 Ct. Cls. 182 (1941);
Severin v. *U. S.*, 99 Ct. Cls. 435, 442 (1943).

In *Bolivar Cotton Oil Co.* v. *U. S.*, *supra*, the Court quoted from Section 3477 and added, at page 187:

> "* * * The transfer here made was purely voluntary and therefore absolutely null and void under the statute. See *U. S.* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484; *National Bank of Commerce* v. *Downie*, 218 U. S. 345".

It is apparent, therefore, that the *Martin* case has become the subject of conflicting interpretation to the prejudice of the orderly and uniform application of an important Federal Statute, creating a situation which calls for correction by the intervention of this Court.

POINT V.

The legislative history of the Assignment of Claims Act of 1940, amending Section 3477, indicates Congressional understanding that *National Bank of Commerce* v. *Downie* clearly represents the present state of the law under said section.

R. S. 3477 was first enacted in 1846. It has evidently been found to serve the public interest well, for Congress, except for the amendment noted below, has not seen fit to change it and has indeed reenacted it from time to time.

In 1940 Congress amended the Statute by enacting the Assignment of Claims Act of 1940 for the purpose of aiding the National Defense by facilitating the financing of war contracts. The amendment permitted the assign-

ment of Government claims to a limited class of assignees, namely, banks, trust companies and other financial institutions, upon compliance with certain conditions.

A hearing was held on the proposed bill (S. 4340) by the Senate Committee on Banking and Currency on September 14, 1940.

At this hearing and in the Committee Report (No. 2136) emphasis was placed upon the strict wording of Section 3477 and the strict construction it had received. *National Bank of Commerce* v. *Downie* was cited in this connection. No reference was made to *Martin* v. *National Surety Company* which had been decided in 1937.

On the floor of the Senate, Senator Barkley, who was in charge of the bill, made the following reference to Section 3477:

> "Under the present law contractors cannot even assign their contracts to anyone else * * *" (Cong. Rec. Vol. 86, Part II, p. 12803).

In the House the bill was referred to the Committee on the Judiciary. In reporting out the bill, the Committee stated (Report No. 2925, 76th Cong. 3rd Session):

> "Section 3477 of the Revised Statutes makes assignments of claims against the United States null and void unless they are made after the claims have been allowed and warrants issued. This latter statute is so strictly worded and has been so strictly construed that an attempted assignment which does not comply with the exact terms of the statute has been held void even as between the assignor and the assignee, so that it confers no rights in the assignee as against a trustee in bankruptcy of the assignor (*National Bank of Commerce* v. *Downie*, 218 U. S. 345)."

In explaining the measure on the floor of the House, Mr. Summers, Chairman of the Committee, said:

> "If this bill is not enacted there can be no assignment of claims, this is the first proposition * * *" (Cong. Rec. Vol. 86, Part II, p. 12557).

From the foregoing, the understanding of Congress clearly appears that informal assignments of Government claims are absolutely null and void as between assignor and assignee. Omission of any reference to *Martin* v. *National Surety Company* in the House Report or in the debates indicates that the strict rule of construction reiterated by this Court in *National Bank of Commerce* v. *Downie* has not been effected by the *Martin* decision.

It is submitted, therefore, that the enactment of the Assignment of Claims Act of 1940 had extreme significance. As this Court has several times lately observed resort may be had to such explanatory legislative history no matter how clear the words of the Statute may be.

Prussian v. *U. S.*, 282 U. S. 675, 678-679;
Harrison v. *Northern Trust Co.*, 317 U. S. 476, 479;
U. S. v. *American Trucking Association*, 310 U. S. 534, 543-544;
U. S. v. *Dickerson*, 310 U. S. 554, 562.

POINT VI.

The public interest and the interest of the Government will be promoted by prompt settlement by this Court of the questions here involved.

A logical extension of the holding of the lower Court in this case would, in the words of this Court in the *Downie* case, result in "a repeal of the Statute by mere judicial construction" (pp. 356, 357). It would open the door

to those evils which, as has been noted in this Court on several occasions, the Statute was designed to prevent (*Spofford* v. *Kirk*, 96 U. S. 484, 489-590).

More specifically with respect to the subject matter of this controversy, it would expose to the evils of free and marketable assignment millions of dollars worth of unliquidated claims filed every year by importers for the refund of customs duties erroneously exacted.

Furthermore, in view of the unprecedented number of Government contracts now outstanding, it is probable that the question here presented will arise in many cases involving claims under those contracts. For these reasons it is essential, in the public interest, that a final determination of this question be made at the present time.

Respectfully submitted,

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

JOHN F. X. FINN,
VERNON C. RYDER,
Of Counsel.

APPENDIX A.

LETTER CONTAINING ALLEGED ASSIGNMENT.

November 7, 1935.

S. A. SCOTTI & CO., MONZA, ITALY.
AMERICAN SCOTTI CORP., NEW YORK, N. Y.

Gentlemen:

In reference to contract dated November 30th, 1932, and cables exchanged since then in relation to this contract, we hereby agree that we are paying you, and specifically, per your cable dated November 6th, direct to Mr. B. Scarpa instead of American Scotti Corporation, the sum of Ten Thousand Dollars ($10,000.)

It is understood that with this payment of Ten Thousand Dollars ($10,000), S. A. Scotti & Company and American Scotti Corporation are paid in full for all Felts which they have had in the United States. It is understood that we release them from further obligations to us, and that they release us in full.

Likewise, it is understood that, in reference to duties, any refunds accruing on all Felts imported by American Scotti Corporation, or ourselves for account of American Scotti Corporation or for account of S. A. Scotti & Company of Monza, are for account of Henry Pollak, Inc., and that, likewise, any additional duties that may be imposed are for account of Henry Pollak, Inc.

The above agreement is considered as a complete General Release on the foregoing basis, and in consideration of the foregoing and in full payment, our check for Ten Thousand Dollars ($10,000) is being made out to Mr. B. Scarpa.

This agreement has no bearing on any Straw goods we may be holding for American Scotti Corporation.

Very truly yours,

HENRY POLLAK, INC.
By: (Signed) MAURICE POLLAK

MP:RD

AGREED TO, FOR AMERICAN SCOTTI CORPORATION

(Signed) B. Scarpa
Secretary

AGREED TO, FOR S. A. SCOTTI & Co. MONZA, ITALY.

(Signed) B. Scarpa
Special Representative

APPENDIX B.

Opinion of Justice Denying Petitioners' Motion for Judgment on the Pleadings.

This motion is made by plaintiffs and seeks judgment on the pleadings. The action is, nominally, to reform a certain agreement entered into between the plaintiffs and the defendant on November 7, 1935. For several years prior thereto defendant had represented plaintiffs as American agent in the sale of felts manufactured or marketed by the plaintiffs. In 1935 plaintiffs sold their American stock of merchandise to defendant under an agreement which included the following in one of its paragraphs: "Likewise, it is understood that, in reference to duties, any refunds accruing on all Felts imported by American Scotti Corporation or ourselves (meaning the defendant Henry Pollak, Inc.) for account of American Scotti Corporation, or for account of S. A. Scotti & Company of Monza, are for account of Henry Pollak, Inc. and that, likewise, any additional duties that may be imposed are for account of Henry Pollak, Inc." In consideration of the agreement defendant paid the sum of $10,000 to the plaintiffs, after increasing a lower offer which it had previously made of about $7,000.

On July 22, 1938, plaintiffs instituted an action against the defendant which, nominally, sought to reform the contract by eliminating the provision as to refunds of custom duties belonging to defendant. The complaint alleges that the agreement as to transfers of the refunds was executed by plaintiff as a result of claimed misrepresentation, fraud on the part of defendant and ignorance and mistake on the part of plaintiff. Among the defenses, apart from denials, are those of ratification and estoppel.

On no theory can there be a judgment on the pleadings in favor of plaintiffs. The most the latter can require is

a striking out of the separate defenses dealing with ratification, estoppel and laches, on the ground that under no circumstances can an assignment of a claim for refunds of duty be upheld. Under plaintiffs' theory, no ratification on the part of plaintiffs could make good something which is absolutely forbidden by law, namely, an assignment to another of claims against the United States. Consequently, the motion must be treated as tantamount to one for a declaratory judgment to the effect that in so far as the agreement between the parties purports to transfer the claims against the United States for refunds, the provision is absolutely null and void. If this is to be the construction, then it would not matter that there had been ratification, laches or estoppel. The agreement as to such assignment would nevertheless be null and void. While plaintiffs may not have judgment on the pleadings, if their contention as to the invalidity of the assignment is correct, they may obtain partial relief in the way of a striking from the answer the separate defenses dealing with ratification and estoppel. The crucial contention in this motion is as to the effect of Section 3477 of the Revised Statutes of the United States, reading as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein whether absolute or conditional, and whatever may be the consideration, therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer, and it must appear by the certificate that the officer at

the time of the acknowledgment read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

It is evident from a reading of the paragraph of the contract upon which defendant's claim to refunds is based, that the assignment therein contained was entirely informal. Under these circumstances is the statute just quoted to be construed so as to make absolutely void the informal provision of the contract between the parties as to the assignment of claims for refund? Any doubt which may exist on this point has been definitely disposed of by the Supreme Court of the United States in *Martin* v. *National Surety Co.* (300 U. S. 588). Previous to that decision there was a line of cases such as *National Bank* v. *Downie* (218 U. S. 345), which supported plaintiffs' contention. As stated by Mr. Justice Cardozo in the *Martin* case (*supra*), another line of cases exhibited an opposing tendency referring to *Lay* v. *Lay* (284 U. S. 24) and a number of other cases cited, including *York* v. *Conde* (147 N. Y. 486). As to this second line, the learned justice said: "These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government. After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed. * * * To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason. Many an analogy from fields uncovered by the statute reinforces that conclusion. An assignment ineffective at law may none the less amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice."

If there is any doubt that full protection of the rights of the Government in the instant situation exists, it is

fully disposed of by the previous appointment by Mr. Justice McLaughlin of a receiver of the prospective funds in suit herein, and the injunction restraining plaintiffs from collecting, assigning or otherwise disposing of the aforesaid claims for customs refunds on wool felt hat bodies. This receivership was allowed upon the application of the defendant. It was thus recognized by the court that collection by the receiver of any refunds would be a complete exoneration of any claims against the Government. Further litigation between the parties as to the respective rights to such refunds would proceed after the analogy of an interpleader. The contention by the plaintiffs of the absolute invalidity of the assignment must therefore be overruled and defendant permitted to litigate its affirmative defenses on the merits.

The motion for judgment on the pleadings is denied. Order signed.

APPENDIX C.

OPINION OF TRIAL JUSTICE.

The agreement upon which this cause proceeds attempted to effect an assignment of any accruing refunds of certain import duties paid under protest to the United States Government. It is contained in the agreement of November 7, 1935, and by this action plaintiff seeks to eliminate therefrom the provision effecting the assignment upon the ground that it is in violation of Section 3477 of the Revised Statutes of the United States and is thus null and void; that in the making of the contract defendant was guilty of fraud and misrepresentation; and that it should be reformed for the reason that it is ambiguous and did not express the true intent of the parties.

Heretofore, plaintiffs moved for judgment on the pleadings and the motion was denied upon the authority of *Martin* v. *National Surety Co.* (300 U. S. 588). The Special Term declared that by reason of the appointment of a receiver with authority to prosecute and collect the claims for refund in suit, and the restraint against the parties to pursue such claims, the assignment was not null and void for all purposes under that statute. On the contrary, the action became one in the nature of an interpleader and the court could adjudicate the equities between the parties without frustrating the purpose of the statute. Upon appeal the determination was affirmed (259 App. Div. 878).

Moreover, at the time of the trial the United States Goverment was absolved of all liability and had voluntarily made full payment to the receiver of all the refund claims in suit as to which any question might have been raised under Section 3477. Thus, this portion of the *res* was actually in *custodia legis* at and before the trial,

discharged of any interest of the Government in it, and subject to disposition by this court as the equities may require. For this further reason the plaintiffs' contentions under Section 3477 are without merit.

Unless, therefore, the claim of fraud and misrepresentation or of ambiguity is sustained the defendant must prevail. In this connection it is clear from the proof that the agreement was made on behalf of plaintiffs by their authorized agent with full knowledge of the facts and of the entire situation as it then existed with respect to the type of import duty here involved and at a time when plaintiffs found it both necessary and advantageous to conclude it. The event proved, however, that the assigned asset, deemed of doubtful value, suddenly and unexpectedly assumed great value when the Court of Customs and Patent Appeals reversed the Customs Court and sustained the protest made in another and similar case. In connection with the claim for reformation there is no ambiguity in the agreement and the proof shows that it correctly expressed the intent of the parties.

Since this view of the issues is sufficient to defeat plaintiff's claim, it is unnecessary to give further consideration to the separate defenses. In any event the proof did sustain them. Defendant is entitled to recover upon its counterclaim which seeks a declaration of the respective rights of the parties and incidental relief.

The funds in dispute are the property of the defendant and must be turned over to it.

The proposed findings have been passed upon.

Let the prevailing party submit decision and decree accordingly.

Dated, July 2d, 1942.

A. L.,
J. S. C.

(28)

FILED
NOV 11 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944 **No. 626**

AMERICAN SCOTTI CORPORATION AND
S. A. SCOTTI & C. OF MONZA, ITALY,
Petitioners,

against

HENRY POLLAK, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT, NEW YORK COUNTY

BRIEF FOR HENRY POLLAK, INC., IN OPPOSITION

EDWIN A. FALK,
Counsel for Respondent.

HAROLD D. KLIPSTEIN,
Of Counsel.

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Statement

By written agreement dated November 7, 1935, the petitioners, an Italian corporation and its wholly owned American subsidiary, sold to the respondent all of their felt hat bodies on hand in the United States that had been imported from Italy by the petitioners. It was further expressly provided by the said written agreement that any customs refunds and any additional duties with respect to the said importations would be for the account of the respondent. (The agreement is printed in full in petitioners' brief, at pp. 29-30.)

On November 22, 1937, as a result of a decision of the United States Court of Customs and Patent Appeals reversing the United States Customs Court, it appeared likely that substantial customs refunds would result from the importations of felt hat bodies by the petitioners. The petitioners' American agent was informed by the respondent of the determination of the Court of Customs and Patent Appeals the day after the decision was rendered (Decision, Finding 31). On that very day he wrote to his principal in Italy as follows: "Whereas this agreement [the agreement of November 7, 1935] was necessary it is now to our complete disadvantage." He added that there was a possibility that the petitioners would receive a portion of any saving that might be made by reducing the 50% retainer which had been made by the petitioners with their customs attorneys here. (Exhibit 10-B.) In response to that letter, the Italian corporation wrote that it was pleased to read "that there is the eventual possibility of recovering something on the payments made to the customs on our importations into the United States from 1930 on. * * * Please act in the best manner and in our interest in order to recover something." (Exhibit 11-B.) This suit was the response to the instruction "to recover something."

The petitioners sued both to "rescind" and to "reform" certain portions of the November 7, 1935 agreement. They sought to rescind only so much of the agreement as provides in its third paragraph that certain customs refunds "are for the account of Henry Pollak, Inc." In the alternative, they sought a reformation of the agreement by striking out the third paragraph thereof which provided that any customs refunds and any additional customs duties with respect to the importation of the petitioners' felt hat bodies would be for the account of the respondent. (Complaint, prayer for relief, pars. 1 and 2.)

The respondent pleaded several affirmative defenses in its answer. The only one that is relevant to this appli-

cation is the second affirmative defense of laches and estoppel. (Answer, pars. 13-17.)

The customs refunds that are the subject of this suit were payable of record either to the respondent directly or to the petitioner American Scotti Corporation. Before the case was reached for trial an order was made in the action appointing a receiver to prosecute the collection of the customs claims made in the name of the petitioners and to hold the proceeds subject to the order of the Supreme Court of the State of New York. Prior to the trial of the action the United States paid to the receiver all the refunds on importations made in the name of petitioner American Scotti Corporation, and the receiver held the net proceeds of the said refunds subject to the order of the Supreme Court of the State of New York. (Decision, Findings 37-40.)

The refunds that were payable of record to the respondent directly were paid to it by the United States prior to the trial of the action. (Decision, Finding 36.)

Summary of Argument

1. No Federal question is involved so as to give this Court jurisdiction to review the judgment of the Supreme Court of the State of New York which gave effect to the petitioners' written assignment to the respondent, of their claims against the United States, although the assignment was not executed in accordance with Section 3477 of the Revised Statutes. (Point I, pp. 4-6.)

2. The judgment of the Supreme Court of the State of New York rests upon two separate non-Federal grounds, each of which is sufficient to sustain the judgment. (Point II, pp. 6-7.)

3. In recognizing the petitioners' written assignment of their claims against the United States, not executed in accordance with Section 3477, the New York State courts followed the applicable decisions of this Court. (Point III, pp. 7-9.)

ARGUMENT

POINT I

No Federal question is involved so as to give this Court jurisdiction to review the judgment of the Supreme Court of the State of New York which gave effect to the petitioners' assignment to the respondent, of their claims against the United States, although the assignment was not executed in accordance with Section 3477 of the Revised Statutes.

By the written agreement of November 7, 1935, the petitioners assigned to the respondent the proceeds of certain customs refunds. The assignment admittedly was not executed in accordance with Section 3477 of the Revised Statutes. The courts of the State of New York gave recognition to the assignment. The petitioners assume jurisdiction in this Court upon the theory that, since the assignment of the petitioners' claims against the United States was not in accordance with the requirements of Section 3477, the petitioners have a "right, privilege or immunity" to be relieved of their bargain.

This Court has specifically held that an issue as to whether or not a state court should enforce an assignment of a claim against the United States not executed in accordance with Section 3477, between the parties, does not present a Federal question, *Conde* v. *York,* 168 U. S. 642. In that case the courts of the State of New York recognized an assignment of a portion of a claim against the United States, although the assignment was not executed in accordance with the requirements of Section 3477. A review of the determination of the New York state courts was sought in this Court. In his opinion dismissing the writ of error, Chief Justice Fuller said:

"In *Walworth* v. *Kneeland*, 56 U. S. 15 How. 348, it was ruled, where a case was decided in a state court against a party who was ordered to convey certain land, and he brought the case up to this court on the ground that the contract for the conveyance of the land was contrary to the laws of the United States, that this was not enough to give jurisdiction to this court under the 25th section of the judiciary act. The state court decided against him on the ground that the opposite party was innocent of all design to contravene the laws of the United States. Mr. Chief Justice Taney, however, said: 'But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the 25th section of the act of 1789 he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights and merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. . . .' "

All that petitioners contend is that the formalities of the written assignment did not conform to the provisions

of Section 3477. But even if they argued, which they do not, that the assignment here was in violation of law, and if they could sustain such an argument, it would avail them nothing, because as Chief Justice Fuller observed: "But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law."

POINT II

The judgment of the Supreme Court of the State of New York rests upon two separate non-Federal grounds, each of which is sufficient to sustain the judgment.

A

The trial court found that the petitioners were barred by laches and were estopped from seeking to modify, reform or rescind the agreement in suit (Decision, Findings 33-35). The petitioners do not challenge these findings in any way.

The defense of estoppel is sufficient to sustain the judgment, even assuming that the petitioners are correct that the New York State courts were in error in their determination of the so-called "Federal question", *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157, 163-6.

B

In its decision, the trial court also made the following finding:

> "28. The plaintiffs * * * have not sought and do not seek rescission of the agreement in suit in its entirety."

It is well settled by the decisions of the courts of the State of New York that a plaintiff may not rescind a contract in part and affirm it in part. *Merry Realty Co.* v. *Shamokin & Hollis R. E. Co.*, 230 N. Y. 316, 323; *Slater* v. *Slater*, 208 App. Div. 567, 573; *Goins* v. *Atwood*, 204 App. Div. 439, 441; *Hayward* v. *Wemple*, 152 App. Div. 195, 198; *McNaught* v. *Equitable Life Assurance Society*, 136 App. Div. 774, 776-7.

The fact that the plaintiff sought only a partial rescission of the November 7, 1935 agreement was in itself an independent and sufficient reason for the New York State courts to deny the petitioners the relief they sought.

POINT III

In recognizing the petitioners' written assignment of their claims against the United States, not executed in accordance with Section 3477, the New York State courts followed the applicable decisions of this Court.

In his opinion, the trial judge explicitly stated the basis for his recognition of the assignment of the petitioners' claims to the respondent, as follows:

> "Heretofore, plaintiffs moved for judgment on the pleadings and the motion was denied upon the authority of *Martin* v. *National Surety Co.* (300 U. S. 588). The Special Term declared that by reason of the appointment of a receiver with authority to prosecute and collect the claims for refund in suit, and the restraint against the parties to pursue such claims, the assignment was not null and void for all purposes under that statute. On the contrary, the action became one in the nature of an interpleader and the court could adjudicate the equities between the parties without frustrating the purpose of the statute. Upon appeal the determination was affirmed (259 App. Div. 878).

> "Moreover, at the time of the trial the United States Government was absolved of all liability and had voluntarily made full payment to the receiver of all the refund claims in suit as to which any question might have been raised under Section 3477. Thus, this portion of the *res* was actually in *custodia legis* at and before the trial, discharge of any interest of the Government in it, and subject to disposition by this court as the equities may require. For this further reason the plaintiffs' contentions under Section 3477 are without merit."

The trial judge properly enforced the assignment not only because of the decision of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588, but also because it is settled in this Court and elsewhere that, where a court of equity obtains jurisdiction over the *res* that is the subject of the assignment, it will decree and enforce the rights of the parties according to the equities, unhampered by the provisions of Section 3477, and that the United States Government must recognize the authority of a state court receiver appointed to receive the proceeds of a claim against the United States Government. *Price* v. *Forrest*, 173 U. S. 410.

The cases illustrating the said rule are legion. See *McGowan* v. *Parish*, 237 U. S. 285; *Erwin* v. *U. S.*, 97 U. S. 392; *McKnight* v. *U. S.*, 98 U. S. 179; *Bailey* v. *U. S.*, 109 U. S. 432; *Hobbs* v. *McLean*, 117 U. S. 567; *U. S.* v. *Borcherling*, 185 U. S. 223; *Portuguese-American Bank* v. *Welles*, 242 U. S. 7; *Dulaney* v. *Scudder*, 94 Fed. 6 (C. C. A. 5); *Roomberg* v. *United States*, 40 Fed. Supp. 621; *Redfield* v. *U. S.*, 27 Ct. Cls. R. p. 393; *McKay* v. *U. S.*, 27 Ct. Cls. R. p. 422; *People's Trust Company* v. *U. S.*, 38 Ct. Cls. R. p. 359; *Richmond & Danville Railroad Company* v. *Gorman*, 7 App. Cases, D. C. 91; *Oregon Steamship Co.* v. *Otis*, 100 N. Y. 446; *Fortunato* v. *Patten*, 147 N. Y. 277; *Leonard* v. *Whaley*, 91 Hun 304.

In the case at bar the assignment in question does not stand alone but forms part of a larger transaction of which the assignment was one item. What the petitioners are trying to do is to retain all of the benefits that they derived from the transaction but relieve themselves of the assignment. It has been held that an assignor may not retain the benefits of an agreement and also avoid its burdens. *People of State of New York* v. *Hanley Milling Co.*, 41 Fed. Supp. 844, aff'd 123 Fed. (2d) 819.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 626.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,
Petitioners,

—against—

HENRY POLLAK, INC.,
Respondent.

REPLY BRIEF OF PETITIONERS.

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

JOHN F. X. FINN,
VERNON C. RYDER,
Of Counsel.

THE COURT PRESS, N. Y. C.

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REPLY BRIEF OF PETITIONERS.

As to Respondent's Point I.

Respondent claims, on the alleged authority of *Conde* v. *Yorke,* 168 U. S. 642, that the instant case does not present a federal question. In *Conde* v. *Yorke,* however, the dismissal of the writ of error was expressly placed upon the ground that the plaintiff-in-error was not a person claiming a right or immunity under a federal statute. The plaintiff-in-error in that case was not, as here, the holder of a Government claim. He was, rather, a subsequent assignee who had been placed in possession of the fund by the claimant and sought to avail himself of R. S. 3477 for the purpose of striking down a prior assignment. He was defeated in the State Court and grounded his petition to this Court for a writ of error on the claim that he was a person deprived of a right or immunity under R. S. 3477. Obviously, the only person, other than the Government, who

can assert a right or immunity under R. S. 3477 is one of the parties to an assignment of a claim against the Government. Plaintiff in error in the *Conde* case, not having been such a person, the writ of error was understandably dismissed. The Court said that, in order that it might have jurisdiction, the title or right under the statute "must be a title or right of the plaintiff-in-error and not a third person only; * * *" (p. 648).

In the instant case, it is clear that the right or immunity claimed under the statute is the right or immunity of petitioners and not of a third person. Therefore, *Conde* v. *Yorke* is not in point.

No more in point is *Walworth* v. *Kneeland*, 15 How. 348, cited on page 5 of respondent's brief. There the plaintiff-in-error was seeking to free himself from a contract whose fraudulent purpose, according to his own claim, was to prevent competition in the sale of public lands. The Court, in dismissing the writ for lack of jurisdiction, said that while the fraud, if proved, should have barred enforcement of the contract, it did not constitute the setting up of "any right or title under an Act of Congress" (p. 352).

As to Respondent's Point II.

In his Point II, respondent again attacks the jurisdiction of the Court. He argues that the judgment below may be rested on two separate non-federal grounds, either of which is sufficient to sustain it. The argument is clearly unsound. An attempted assignment, made null and void by a federal statute, cannot be vitalized by ratification or estoppel; nor is it any the less void because it formed part of a larger transaction.

Doherty v. *Bartlett,* 81 Fed. (2nd) 920, 926-927; cert. denied 298 U. S. 676;
Pullman's Palace Car Company v. *Central Transportation Co.,* 171 U. S. 138, 149;
Thomas v. *Railroad Co.,* 101 U. S. 71, 86;
E. E. Taenzer & Co. v. *Chicago R. I. & P. Ry. Co.,* 191 Fed. 543, 551 (C. C. A. 6th).

Hence it would appear that respondent points to no non-federal ground on which to rest his judgment. Moreover the case of *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, mentioned at page 6 of respondent's brief, lays down this important qualification to the principle of law for which the respondent cites it as authority:

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain" (p. 164).

See also *Ward* v. *Love County,* 253 U. S. 17, at pp. 22-23.

In the *Enterprise Irrigation* case the Court dwelt upon the necessity that the non-federal question be not intertwined with the federal question. The instant case presents even a stronger situation in favor of jurisdiction. Here a determination of the federal question in petitioners' favor necessarily carries with it the destruction of subsidiary non-federal questions.

As to Respondent's Point III.

In this point of his brief respondent contends that where a state court of equity has obtained jurisdiction of the *res* it may dispose of the fund in complete disregard of R. S. 3477. This is directly con-

trary to the holding of this Court in *National Bank of Commerce* v. *Downie*, 218 U. S. 345. The cases which respondent cites in alleged support of his proposition do not bear him out. They may be grouped as follows:

1. Cases where the invalidity of the assignment under R. S. 3477 was expressly pronounced:

McGowan v. *Parish*, 237 U. S. 285, where, despite the invalidity of the assignment, the amount of an attorney's compensation was measured by the percentage called for by such assignment.

McKnight v. *U. S.*, 98 U. S. 179, where the Government was not permitted to recover, by way of counterclaim, money paid out under an invalid assignment because the money had been paid out on the strength of a receipt signed by the assignor.

2. Cases which were unsuccessfully urged upon this Court in *National Bank of Commerce* v. *Downie*, *supra*:

Price v. *Forest*, 173 U. S. 410;
Erwin v. *U. S.*, 97 U. S. 392;
Bailey v. *U. S.*, 109 U. S. 432;
Hobbs v. *McLean*, 117 U. S. 567.

3. Cases expressly turning upon the proposition that the claimant was a receiver invested with title to the fund, thereby converting the transaction into an assignment by operation of law. Consequently, under long established principles, the assignment was withdrawn from the ambit of the statute:

U. S. v. *Bocherling*, 185 U. S. 223;
Redfield v. *U. S.*, 27 Ct. Cls. 393;

McKay v. *U. S.*, 27 Ct. Cls. 422;
People's Trust Company v. *U. S.*, 38 Ct. Cls. 359.

To the foregoing cases, under this heading, may be added *Leonard* v. *Whaley*, 91 Hun 304, which was another phase of the litigation involved in *People's Trust Co.* v. *U. S.*, *supra*.

It is to be noted that in the instant case the receiver was not a general receiver of petitioner's property but a temporary receiver only. As such he was merely a custodian appointed by the Court to take possession of and preserve *pendente lite* the fund in litigation. No title passed to him. As was stated by this Court in *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, at page 432:

> "* * * The possession of the receiver is that of the Court, and he holds, pending the suit, for the benefit of whomsoever it shall in the end be found to concern. Neither the title nor the rights of the parties are changed by his possession. He acts as the representative of the Court in keeping the property so that it may be subjected to any decree that shall finally be rendered against it."

To the same effect, see *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 236.

4. Cases which did not turn upon Section 3477:

Fortunato v. *Patten*, 147 N. Y. 277;
Oregon Steamship Co. v. *Otis*, 100 N. Y. 446;
Dulaney v. *Scudder*, 94 Fed. 6 (C. C. A. 5th);
Portuguese-American Bank v. *Welles*, 242 U. S. 7;
Richmond & Danville R. R. Co. v. *Gorman*, 7 App. Cas. D. C. 91.

5. And the following case involving an assignment akin to one by operation of law:

Roomberg v. *U. S.*, 40 Fed. Supp. 621.

In the *Roomberg* case the assignee was the sole stockholder of the assignor corporation. The so-called assignment took place as a result of the liquidation of the corporation. The Court held that the assignee, even before the assignment, was the beneficial owner of the assets of the corporation and hence that there was no real assignment and Section 3477 was not applicable.

It is further to be noted that Scotti of Monza's share of the refunds, amounting to approximately one-third of the total refunds in suit, never came into the hands of the receiver. (Defendant's Exhibits A and B; Min. pp. 3, 699.) Consequently, the Court never took possession of that portion of the *res*. This feature of the case is completely ignored by the respondent in the presentation of his Point III to this Court.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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